

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL CASE NO. 3:22-cv-00077-FDW
(CRIMINAL CASE NO. 3:17-cr-00134-FDW-DSC-21)**

PEDRO GUTIERREZ,)	
)	
Petitioner,)	
)	
vs.)	<u>ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
_____)	

THIS MATTER is before the Court on initial screening of Petitioner’s Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. [CV Doc. 1].¹

The Court has conducted an initial screening of the petition under the Rules Governing § 2255 Proceedings, Rule 4(b) 28 U.S.C.A. foll. § 2255, and finds that the petition may be untimely.

On May 17, 2018, a jury found Petitioner guilty on one count of RICO conspiracy in violation of 18 U.S.C. §§ 1962(d) and 1963(a). [CR Doc. 1568: Jury Verdict]. Petitioner was sentenced to a term of imprisonment of 240 months. [CR Doc. 2035: Judgment]. Judgment on Petitioner’s conviction was entered on September 6, 2018. [Id.]. On June 26, 2020, Petitioner’s conviction was affirmed on appeal. United States v. Gutierrez, 963 F.3d 320 (4th Cir. 2020). On January 11, 2021, the Supreme Court denied Petitioner’s petition for writ of certiorari. Gutierrez v. United States, 141 S.Ct. 1112 (2021). As such, for purposes of 28 U.S.C. § 2255(f), Petitioner’s sentence became final that day.

¹ Citations to the record herein contain the relevant document number referenced preceded by either the letters “CV,” denoting that the document is listed on the docket in the civil case file number 3:22-cv-00077-FDW, or the letters “CR,” denoting that the document is listed on the docket in the criminal case file number 3:17-cr-00134-FDW-DSC-21.

On February 23, 2022, the Clerk of this Court received Petitioner's petition by certified mail and opened the instant case. [See Doc. 1-2]. Petitioner signed his petition and attested that he placed it in the prison mailing system on January 3, 2022. [Doc. 1 at 12]. Plaintiff enclosed the petition with a cover letter that was also dated January 3, 2022. [See Doc. 1-1]. The Court, however, did not receive the petition until over seven weeks later.

If Petitioner did, in fact, place his petition in the prison mailing system on January 3, 2022, it is timely. If, however, Petitioner placed his petition in the prison mailing system after January 11, 2022, it is untimely. Given the significant difference between the date Petitioner claims to have signed his petition and the date it was received by the Court, the Court will order the parties to obtain, prepare, and/or submit information and testimony to allow the Court to determine whether Petitioner's petition was timely.

The Court, therefore, requires the Government to obtain and submit documents, affidavits, or other records demonstrating the following:

- (1) Any logs or other records of prisoner mail that shows when Petitioner delivered his petition to prison authorities and when the petition was mailed by prison authorities; and
- (2) Any changes to prisoner mail procedure or efficacy occurring or existing between January 1, 2022 and February 23, 2022 that may have impacted the delivery of Plaintiff's petition, incident to the Covid-19 pandemic or otherwise, and any records or other information that may inform the Court's determination of whether Plaintiff timely filed the instant petition in this case.


The Court requires the Petitioner to submit an affidavit addressing the circumstances and timing of his submission of his petition in detail. Petitioner is also required to submit a

copy of the return receipt from his mailing of the petition by certified mail. Petitioner is advised that an affidavit is a written statement under oath; that is, a statement prepared in writing and sworn to before a notary public. In the alternative, an unsworn statement, made and signed under penalty of perjury, may also be submitted.

ORDER

IT IS, THEREFORE, ORDERED that the parties shall file these affidavits and other records within 21 days of this Order in accordance with the terms of this Order. Failure of Petitioner to respond in accordance with this Order will result in the Court determining that Petitioner did not timely file his petition in this matter.

Signed: February 28, 2022


Frank D. Whitney
United States District Judge

